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No. 93-1444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Petitioners,

v.

DANIEL J. GATELY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Whether *Sampson v. Murray*, 415 U.S. 61 (1974), requires application of a heightened standard for irreparable harm in every case in which government employees seek preliminary injunctive relief pursuant to the Age Discrimination in Employment Act.

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TO THE HONORABLE SUPREME COURT:

The respondents, Daniel J. Gately, et al., respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the petitioners, the Commonwealth of Massachusetts, et al.

Opinions Below

The Opinion of the United States Court of Appeals for the First Circuit is reported at 2 F.3d 1221 (1st Cir. 1993), and is reprinted in the Appendix to the petitioners' Petition for Writ of Certiorari at A-1 through A-30.[1]

The Memorandum and Order of the United States District Court for the District of Massachusetts is reported at 811 F. Supp. 26 (D. Mass. 1992), and is reprinted at A-31 through A-44.

Statutes Involved

Other than the statutes set forth by petitioners in the Petition at 3, and in the Appendix at A-54 through A-56, the following statutes are involved in this case:

Mass. Gen. L. ch. 32, §§1, 3(2)(g) and 26(3)(a) (West 1989), which relate to mandatory retirement ages in Massachusetts, are reprinted in relevant part at RA-1 through RA-3.

29 U.S.C. §626(c)(1), one provision of the Age Discrimination in Employment Act, provides in relevant part that:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such

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[1] Hereinafter, references to the Appendix to Petitioners' Petition for Writ of Certiorari will be as follows: A-_. References to the Appendix to Respondents' Brief in Opposition will be as follows: RA-_.

legal or equitable relief as will effectuate the purpose of this chapter....

Statement of the Case

On July 1, 1992, four law enforcement agencies of the Commonwealth of Massachusetts -- the Metropolitan District Commission Police Force ("MDC"), the Capitol Police Force, the Law Enforcement Division of the Registry of Motor Vehicles, and the Division of State Police -- were consolidated into a single entity now known as the Department of State Police. 1991 Mass. Acts ch. 412, §1 (A-54) (the "Consolidation Bill"). Respondents are all former members of the MDC, Capitol or Registry police forces.

The Consolidation Bill mandates that all Department of State Police officers retire at age 55. Mass. Stat. 1991, ch. 412, §§122, 123 (A-54-56). Before the consolidation, MDC, Capitol, and Registry officers were required to retire at age 65. Mass. Gen. L. ch. 32, §3(2)(g) (MDC, Capitol, and Registry officers classified as Group 4 employees) (RA-1-2); Mass. Gen. L. ch. 32, §1 (Group 4 employees retired at age 65) (RA-1). State Police officers were required to retire at age 50. Mass. Gen. L. ch. 32, §26(3)(a) (RA-2-3).

On December 21, 1992, respondents brought this action alleging that the mandatory retirement provisions of the Consolidation Bill violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.* Respondents sought and obtained preliminary injunctive relief, enjoining the petitioners from involuntarily retiring

respondents and similarly situated individuals, solely by reason of age.[2]

In granting respondents preliminary injunctive relief, the District Court concluded that, "[a]lthough the plaintiffs' claims of irreparable injury are not overwhelming, the harm to them of denying an injunction does seem considerably to outweigh that to the defendants of granting one," *Gately, et al. v. Comm. of Massachusetts, et al.*, 811 F. Supp. 26, 28 (D. Mass. 1992), and that such relief was in the public interest. Distinguishing two First Circuit cases which held that age is a bona fide occupational qualification for the now-defunct Division of State Police, the District Court also held that respondents were likely to succeed on the merits of their claims. *See Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984) (*"Trabucco I"*); *EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986) (*"Trabucco II"*).

The First Circuit affirmed the District Court's order, declining to give *stare decisis* effect to *Trabucco I* and *Trabucco II*, and upholding the District Court's entry of preliminary injunctive relief. *Gately, et al. v. Comm. of Massachusetts, et al.*, 2 F.3d 1221 (1st Cir. 1993). In so doing, the First Circuit properly applied the standards propounded by this Court in *Sampson v. Murray*, 415 U.S. 61 (1974), and properly determined that preliminary injunctive relief was appropriate.

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[2] The District Court subsequently modified its original Order to permit respondents and similarly situated officers to be involuntarily retired upon attaining age 65, but not before. A-47, 48.

Reasons for Denying the Petition for Writ of Certiorari

A. *Sampson* Does Not Require Application of A Heightened Standard For Irreparable Harm In Every Government Personnel Case.

One of the four criteria for entry of preliminary injunctive relief is "that plaintiff will suffer irreparable injury if the injunction is not granted." *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); *see also Sampson*, 415 U.S. at 84, n.53. That criterion does not require proof of overwhelming irreparable harm, but instead requires only a simple showing that plaintiff "will suffer" irreparable harm unless an injunction enters. "The irreparable harm standard is not necessarily met by a given *quantity* of harm; rather, it is met by showing that the *quality* of the harm is irremediable by a monetary damage award." *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172, 1181 (D. Kan. 1988) (emphasis in original). "District courts have broad discretion to evaluate the irreparability of alleged harm...." *Wagner v. Taylor*, 836 F.2d 566, 575-76 (D.C. Cir. 1987).

By its very nature, unabashed age discrimination, particularly when practiced by the state, inflicts truly odious irreparable harm. *E.g., Oshiver v. Court of Common Pleas*, 469 F. Supp. 645, 653-54 (E.D. Penn. 1979) (discrimination by the state is uniquely humiliating and irreparably destroys the bond of trust and respect between government and citizen). Indeed, this Court and others have held that forced

retirements cause irreparable harm and that injunctive relief is a proper remedy.[3] The lower courts' conclusion that the respondents faced some, though not overwhelming, irreparable harm at the time the injunction entered (*Gately*, 2 F.3d at 1234; *Gately*, 811 F. Supp. at 28) was sufficient, in the circumstances of this case, to warrant injunctive relief.

Sampson v. Murray, 415 U.S. 61 (1974), does not require application of an enhanced standard for irreparable harm in every government personnel case. In *Sampson*, the plaintiff had been a probationary federal employee when she was fired for misfeasance. *Id.* at 62-65. She filed a federal suit raising procedural challenges to her firing before exhausting her administrative remedies and sought reinstatement as injunctive relief. *Id.* at 62-67. Her only claimed damages were for lost income and reputation, *id.* at 89, 91, and her affidavit "did not touch in any way upon considerations relevant to irreparable injury." *Id.* at 88. Not surprisingly, the *Sampson* Court found no irreparable harm, stating that "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury," *id.* at 90, and that vindication in an administrative hearing could restore any lost reputation. *Id.* at 91.

Sampson requires district courts evaluating a government employee's request for injunctive relief to undertake a dual inquiry. A district court initially must determine whether it

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[3] *Western Air Lines, Inc. v. Criswell, et al.*, 472 U.S. 400 (1985), notes that the ADEA's legislative history "makes quite clear that the policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions." *Id.* at 410.

has *authority* to issue preliminary injunctive relief. If so, it must determine whether such relief is proper. *Sampson*, 415 U.S. at 68.

As summarized by the First Circuit in this case, *Sampson* articulates five factors weighing against finding *authority* to issue injunctive relief:

> (1) the fact that plaintiff was seeking relief prior to having exhausted her administrative remedies, and the concomitant "disruptive effect which the grant of the temporary relief ... was likely to have on the administrative process," *id.* at 83; (2) the lack of any express statutory basis for the injunction; (3) the absence of any case law supporting this particular injunction; (4) "the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs," *id.* at 83, 94 S.Ct. at 949 (internal quotations omitted); and (5) the fact that plaintiff was a probationary employee entitled to few procedural rights under the relevant regulations, *id.* at 81-82, 94 S.Ct. at 948-49.

Gately, 2 F.3d at 1231. Against these factors must be balanced the harm to the plaintiff if the requested injunctive relief is not granted. *Sampson*, 415 U.S. at 84. Where, as in *Sampson*, all of the enumerated factors are present, a heightened level of irreparable harm is necessary to

overcome the factors weighing against a district court's authority to issue an injunction. *Id.*

> Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that respondent at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases.

Sampson, 415 U.S. at 84.

In *Gately*, the First Circuit correctly applied the *Sampson* analysis, and determined that application of a heightened showing of irreparable harm was inappropriate, given that all administrative remedies had been exhausted and that there was express statutory authority for injunctive relief. *Gately*, 2 F.3d at 1233-34. As the First Circuit concluded:

> [I]rreparable harm is subject to a sliding scale analysis, such that the showing of irreparable harm required of a plaintiff increases in the presence of factors, including the failure to exhaust administrative remedies, which cut against a court's traditional authority to issue equitable relief.

Gately, 2 F.3d at 1232. Although the First Circuit properly considered exhaustion of remedies as one of the *Sampson* factors, there is no basis on which to conclude that the First Circuit limited *Sampson*'s application to cases where a government employee seeks injunctive relief prior to exhaustion of administrative remedies. Petition at 9.

Pursuant to *Sampson*, the First Circuit recognized that the government is traditionally granted wide latitude "in dispatching its own internal affairs," *Gately*, 2 F.3d at 1234, and recognized this as the only one of *Sampson*'s five factors that weighed against the District Court's power to issue injunctive relief. The First Circuit concluded that the District Court properly took this factor into account, and did not err in determining that the respondents had made a sufficient showing of irreparable harm to warrant issuance of injunctive relief. *Id.*

B. There Is No Clear Conflict Among The Circuits In Their Application of *Sampson*.

The cases cited by petitioners do not conflict with the First Circuit's application of *Sampson*. In those cases in which a heightened irreparable harm standard was applied, the circuit courts were faced with circumstances considerably different than those presented by the *Gately* plaintiffs. Because, faced with those situations, it is likely that the First Circuit's analysis would lead to the same results reached by the other circuit courts, there is no conflict among the circuits that merits this Court's resolution.

In *Ekanem v. Health & Hospital Corporation of Marion County*, 589 F.2d 316 (7th Cir. 1978), after being terminated from his employment, and exhausting available administrative remedies, the plaintiff sought a preliminary injunction requiring his reinstatement pending trial. The Seventh Circuit first concluded that the plaintiff had failed to show a "substantial likelihood of success on the merits," *id.* at 321, and then determined that the plaintiff failed to show *any* irreparable harm. *Id.* It also noted that (as contrasted with the *Gately* plaintiffs) the plaintiff sought reinstatement, a remedy "permissible only in the most extraordinary cases." *Id.* at 322.

Although the Seventh Circuit recognized that *Sampson* requires "[a]n extremely strong showing of irreparable injury" when the same circumstances presented by *Sampson* are present, *id.* at 321, the court did not conclude that a heightened showing of irreparable harm was required in every government employment case. Instead, the Seventh Circuit relied on *Sampson*'s holding regarding what constitutes irreparable harm in government personnel cases, but did not reach the issue of the quantum of irreparable harm necessary to warrant injunctive relief. *Id.* at 321, n.13. This Court, the First Circuit and the Seventh Circuit are in accord that loss of income and insignificant loss of reputation alone fall "short of the type of irreparable injury which is a

necessary predicate to the issuance of a temporary injunction in this type of case." *Sampson*, 415 U.S. at 91-92.[4]

Similarly, in *Stewart v. United States Immigration & Naturalization Serv.*, 762 F.2d 193 (2d Cir. 1985), also a Title VII case, the plaintiff sought an injunction requiring reinstatement of employment pending trial. The Second Circuit initially concluded that the district court was without *authority*, the first of step of the *Sampson* analysis, to grant injunctive relief. *Id.* at 197-98. It went on, however, to find that even if the district court did have authority to rule on plaintiff's motion, the requisite showing of irreparable harm was not present.

Although labeling it as a "particularly stringent standard for irreparable injury," the Second Circuit held that, except in "genuinely extraordinary situation[s]," ... "irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment...." *Id.* at 199. The First Circuit did not disagree. Instead, it concluded that "plaintiffs' allegations of

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[4] Petitioners' citation to another Seventh Circuit case highlights the absence of any conflict in *Sampson*'s application. *See EEOC v. City of Janesville*, 630 F.2d 1254, 1259 (7th Cir. 1980). There, the plaintiff sought reinstatement of his employment pending trial of his ADEA claims. The court noted that "[t]he purpose of a preliminary injunction is to ... preserve the status quo," and accordingly that reinstatement pending trial is "an extraordinary remedy permissible only upon a substantial showing of irreparable injury." *Id.* at 1259. The court cited *Sampson* solely for the unremarkable proposition that "irreparable injury does not include loss of income, inability to find other employment, or financial distress." *Id.*

irreparable harm go beyond temporary loss of pay or reputational injury." *Gately*, 2 F.3d at 1234.

Finally, in *Sebra v. Neville*, 801 F.2d 1135 (9th Cir. 1986), another government personnel case, the Ninth Circuit concluded that where the factors enumerated by *Sampson* are present, "a plaintiff must make a greater showing of irreparable injury than is required under the traditional standard governing preliminary injunctions," sufficient to outweigh considerations "'cutting against the general availability of preliminary injunctions in Government personnel cases.'" *Id.* at 1139 (quoting *Sampson*, 415 U.S. at 84). Again, the First Circuit agreed with this approach but, finding the *Sampson* factors not present, declined to require a heightened showing of harm. *Gately*, 2 F.3d at 1234.

C. Even Under A Heightened Standard Of Irreparable Harm, Injunctive Relief Is Appropriate In This Case.

With respect to a court's authority to issue injunctive relief, *Sampson* ends with an explicit caveat:

> [W]e do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case.

Id. at 92, n.68. Unlike *Sampson*, this is not a "routine case" but an extraordinary one, and the unexceptionable maxim that no irreparable injury is ordinarily threatened where "only money" is at risk has no application here.[5]

First, this case does not present a typical employment situation, but instead involves a complex consolidation of four separate state law enforcement agencies. That extraordinary circumstance compelled the District Court's conclusion that the respondents, many of whom hold command responsibilities, would suffer career impairments that money could not restore if they were excluded from the unique, transitional period of complex adjustment to new systems, personnel, assignments, and responsibilities that was ongoing when the issue was decided. Those same circumstances still exist as the merger of the once-separate law enforcement agencies goes forward. *E.g., EEOC v. City of Bowling Green, Ky.*, 607 F. Supp. 524, 527 (W.D. Ky. 1985) (policeman's forced retirement would irreparably damage his ability to keep up with department affairs).[6]

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[5] *Sampson* noted that in the "Back Pay Act," Congress contemplated back wages as "the usual if not the exclusive remedy for wrongful discharge" of federal civil service employees. *Id.* at 90-91. In sharp contrast, the ADEA expressly provides as a remedy for unlawful age discrimination injunctive relief compelling employment. 29 U.S.C. §626(b).

[6] *See also EEOC v. Comm. of Penn.*, 39 FEP Cases 587, 588-89 (M.D. Penn. 1984) (State Police officers' forced retirement with lost position and location of assignment and no guarantee the same posts will be restored is irreparable); *EEOC v. Target Stores, Inc.*, 36 FEP Cases 543, 544 (D. Minn. 1984) (fired manager would suffer irreparable harm by missing training opportunities and new marketing programs); *EEOC*

Second, the District Court also concluded that the respondents faced other forms of irreparable harm that this Court and others have found in other cases involving forced retirements. A sound body of precedent supports the conclusion that forced retirement inflicts irreparable harm of the sort that the *Sampson* case did not present. *E.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 323 (1976) (Marshall, J., dissenting) (older workers facing permanent forfeiture of careers, status in society, and roles as useful citizens confront a uniquely painful loss of identity, dignity, and well-being).[7]

Third, unlike this case, *Sampson* involved no substantive civil rights and no statute explicitly authorizing courts to enjoin employment terminations, as the ADEA does. 29 U.S.C. §626(b), (c). Nor did it concern an entire class of people threatened by age discrimination. It is evident that a particularly harmful form of irreparable damage ensues when the state itself subjects its own citizens and public servants to age discrimination. *E.g.*, *Oshiver v. Court of Common*

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v. Chrysler Corp., 546 F. Supp. 54, 71 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984) (loss of job skill currency and expertise is irreparable); *Keyer v. Civil Service Comm. of N.Y.*, 397 F. Supp. 1362, 1370 (E.D.N.Y. 1975) (policeman's lost time would irreparably deny him career opportunities).

[7] *See also EEOC v. City of Bowling Green, Ky.*, 607 F. Supp. 524 (W.D. Ky. 1985); *EEOC v. Comm. of Penn.*, 39 FEP Cases 587 (M.D. Penn. 1984); *EEOC v. Chrysler Corp.*, 546 F. Supp. at 71-72 (acknowledging *Sampson's* rule that financial disruption alone is not usually irreparable, and holding that forced retirements create the sort of special irreparable harm that *Sampson* anticipated).

Pleas, 469 F. Supp. at 653-54. For each of these reasons, the lower courts correctly found an extraordinary degree of specific irreparable harm.

In sum, this is not a routine case but an extraordinary one. *Sampson* teaches that, in such a case, "circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." *Sampson*, 415 U.S. at 92, n.68.

Conclusion

Based on the foregoing points and authorities, the respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Respondents' Appendix

Mass. Gen. L. ch. 32, §1 (West 1989) provides, in relevant part:

> "Maximum Age", the age on the last day of the month in which any member classified in Group 1 as provided for in paragraph (g) of subdivision (2) of section three attains age seventy, or if classified in Group 2 or Group 4 attains age sixty-five, or if classified in Group 3 attains age fifty-five.

Mass. Gen. L. ch. 32, §3(2)(g) (West 1989) provides, in relevant part:

> (g) Department heads shall furnish to the board within thirty days after employing any new personnel or after receipt of a written request thereof, a statement giving the name, address, title, rate of regular compensation, duties, date of birth and legal and class of service of each employee in his department, and shall notify the board within thirty days of any change in the title, address, rate of compensation, duties or service of any employee in his department. Thereupon the board shall classify each member in one of the following groups:
>
> . . .

> Group 4. - ... officials and employees of the registry of motor vehicles appointed by the registrar under section twenty-nine of chapter ninety; capitol police ... members of the police force of the metropolitan district commission....

Mass. Gen. L. ch. 32, §26(3)(a) (West 1989) provides, in relevant part:

> **(3) Retirement upon Attaining Age Fifty-five or Expiration of Twenty Years of Service for Physical or Mental Incapacity.** (a) Any member in service classified in Group 3 who is an officer or inspector whose last appointment was under section six of chapter twenty-two, who was so last appointed on or after September first, nineteen hundred and twenty-one, and who has performed service in the division of state police or in the division of inspections in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty-five or upon the expiration of such twenty years, whichever last occurs...., unless the rating board certifies to the commissioner of public safety upon examination of the officer or inspector when he attains age fifty-five and annually thereafter, that the mental and physical

condition of the officer or inspector is such that he should be continued in his employment, but in no event shall any such officer or inspector remain in service beyond the last day of the month in which he attains age sixty-five. Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.